UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIA ALVES, individually, and on behalf of all others similarly situated,

Plaintiff,

-against-

AFFILIATED HOME CARE OF PUTNAM, INC., and BARBARA KESSMAN, in her individual capacity,

Defendants.

Civil Action No. 7:16-cv-1593 (KMK)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Dated: Rhinebeck, New York
February 22, 2017

Nathaniel K. Charny (NC 5664)
Charny & Wheeler
9 West Market Street
Rhinebeck, New York 12572
(845) 876-7500
ncharny@charnywheeler.com

Attorneys for the Plaintiff Maria Alves

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

THE COURT'S FEBRUARY 8, 2017 OPINION & ORDER 1

ARGUMENT 2

CONCLUSION 4

TABLE OF AUTHORITIES

Action on Smoking & Health v. C.A.B., 713 F.2d 795 (D.C. Cir. 1983) 3

Envtl. Def. v. Leavitt, 329 F. Supp.2d 55 (D.D.C. 2004) 3

Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) 3

Hawknet, Ltd. v. Overseas Shipping Agencies, 590 F.3d 87 (2d Cir. 2009) 3

Heartland By-Products, Inc. v. United States, 568 F.3d 1360 (Fed. Cir. 2009) 3

Home Care Ass’n of Am. v. Weil, 76 F.Supp.3d 138 (D.D.C. 2014) 2

Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015) 2

Home Health Care Ass’n of Am. v. Weil, --- U.S. ---, 136 S.Ct. 2506 (2016) 3

Kinkead v. Humana, Inc.,
15-cv-01637 (JAM), 2016 WL 3950737 (D.Conn. July 19, 2016) 3

National Fuel Gas Supply Corp. v. F.E.R.C., 59 F.3d 1281 (D.C. Cir. 1995) 4

Resolute Forest Products, Inc. v. U.S. Dep't of Agric.,
130 F.Supp.3d 81 (D.D.C. 2015) 3

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 3

Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp.,
619 F.3d 207 (2d Cir. 2010) 3

PRELIMINARY STATEMENT

Further to Local Rule 6.3, Plaintiff brings this motion for reconsideration and reargument regarding the legal determination made by the Court in its February 8, 2017 Opinion & Order (ECF Docket No. 33), to wit, that the "Home Care Rule" became effective on October 13, 2015.

As discussed below, Plaintiff submits that the Home Care Rule became effective on January 1, 2015.

THE COURT'S FEBRUARY 8, 2017 OPINION & ORDER

In its February 8, 2017 Opinion & Order (herein the Order), the Court ruled on Plaintiff's request for conditional certification of her putative FLSA collective action, as well as Plaintiff's request that the employer produce names and addresses of the collective cohort for purposes of sending notice of the conditional certification. With a tweak to the proposed notice, the Court granted the requested relief.

In so ruling, the Court discussed the "Home Care Rule," which made FLSA's overtime compensation requirements applicable to home care attendants without regard to their extracurricular activities. The Court states both at the beginning of this section of its Order and in conclusion of this section of its Order that "The Rule became effective on October 13, 2015." Order, p. 7.

The question of the effective date of the Home Care Rule was not material to the requested relief in the motion and, as such, Plaintiff did not brief the question nor join issue on the question.[1] By way of this motion, Plaintiff submits such argument and respectfully requests that the Court reconsider its holding in this regard.

---

[1] Plaintiff and the putative class have pled FLSA violations without regard to the Home Care Rule insofar as more than 20% of their activities were and are outside the scope of companionship services, and as such those weeks are subject to FLSA's overtime requirements without regard to the Home Care Rule. Order, p. 6. However, as an alternative claim should the factfinder conclude that there was no extracurricular work above 20%, Plaintiff and the

ARGUMENT

In 2013, the Department of Labor used its rulemaking power to remove the companionship services exemption for workers who provided such services by means of third-party employer arrangements. The DOL explained that "[t]o better ensure that the domestic service employees to whom Congress intended to extend FLSA protections in fact enjoy those protections, the new regulatory text precludes third party employers (e.g., home care agencies) from claiming the exemption for companionship services or live-in domestic service employees." Application of the Fair Labor Standards Act to Domestic Service, 78 FR 60454-01; see also 29 C.F.R. § 552.109 ("Third party employers of employees engaged in companionship services . . . may not avail themselves of the minimum wage and overtime exemption . . . even if the employee is jointly employed by the individual or member of the family or household using the services."). The DOL set an effective date for its new rule of January 1, 2015. See 29 C.F.R. §552.109.

A lobbying group of home healthcare corporations (not directly including Defendants) challenged the DOL's new rule in the United States District Court for the District of Columbia. See Home Care Ass'n of Am. v. Weil, 76 F.Supp.3d 138 (D.D.C. 2014). The Court vacated the DOL's new rule, concluding for reasons not at issue here that the DOL's rule was in conflict with the FLSA. See ibid.

In August 2015, the D.C. Circuit reversed the district court's vacatur of the regulation, concluding that the new rule was grounded in a reasonable interpretation of the FLSA and that it was neither arbitrary nor capricious. See Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C.

---

putative class are entitled to overtime compensation at least as far back as the effective date of the Home Care Rule and as such this legal question, while immaterial to the motion, is material to the instant suit.

Cir. 2015). The D.C. Circuit's mandate issued in October 2015, and the Supreme Court denied certiorari in June 2016. See Home Health Care Ass'n of Am. v. Weil, --- U.S. ---, 136 S.Ct. 2506 (2016).

When a court vacates an agency's rule, such a vacatur "restores the status quo before the invalid rule took effect, and the agency must initiate another rulemaking proceeding if it would seek to confront the problem anew." Envtl. Def. v. Leavitt, 329 F. Supp.2d 55, 64 (D.D.C. 2004); see also Action on Smoking & Health v. C.A.B., 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam); Resolute Forest Products, Inc. v. U.S. Dep't of Agric., 130 F.Supp.3d 81, 103-04 (D.D.C. 2015).

Given the "well-established rule that judicial decisions are presumptively retroactive in their effect and operation," Kinkead v. Humana, Inc., 15-cv-01637 (JAM), 2016 WL 3950737, at *3 (D.Conn. July 19, 2016) (citing authority), "[t]he ruling of the Supreme Court or of a federal court of appeals within its geographical jurisdiction 'is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.'" Id. (quoting Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993); Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758-59 (1995) (re-affirming Harper and rejecting authority of a court absent "special circumstances" to circumvent retroactive application of a judicial decision by means of invoking its remedial discretion).

While Defendants may argue that they relied upon the district court's decision, "any such reliance would not justify a non-retroactive application of the D.C. Circuit's ruling." Id.; see also Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp., 619 F.3d 207, 215 (2d Cir. 2010); Hawknet, Ltd. v. Overseas Shipping Agencies, 590 F.3d 87, 91 & n.7 (2d Cir. 2009); Heartland

By-Products, Inc. v. United States, 568 F.3d 1360, 1365 (Fed. Cir. 2009); National Fuel Gas Supply Corp. v. F.E.R.C., 59 F.3d 1281, 1288 (D.C. Cir. 1995) (rejecting argument that D.C. Circuit's prior vacatur of an administrative decision should not apply retroactively absent "the most compelling circumstances").

Hence, under the well-established doctrine regarding the impact of vacatur, the effective date of the Home Care Rule is therefore as originally intended, January 1, 2015.

CONCLUSION

For these reasons as well as the entire record before the Court, it is submitted that the Court should reconsider its ruling in dicta regarding the effective date of the Home Care Rule, and conclude instead that the Home Care Rule is effective January 1, 2015

Dated: Rhinebeck, New York
February 22, 2017

Nathaniel K. Charny (NC 5664)
Charny & Wheeler
9 West Market Street
Rhinebeck, NY 12572
Tel – (845) 876-7500
Fax – (845) 876-7501
ncharny@charnywheeler.com

Attorneys for Plaintiff Maria Alves